

Supreme Court, U.S.
FILED

051063 2/1/2006

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

POWEREX CORP., A CANADIAN CORPORATION,
dba POWEREX ENERGY CORP.,
Petitioner,

v.

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

J. CLIFFORD GUNTER III
ANDREW EDISON
BRACEWELL & GIULIANI LLP
Pennzoil Place - South Tower
711 Louisiana Street
Suite 2300
Houston, Texas 77002-2781
(713) 223-2300

PAUL W. FOX
DEANNA E. KING
BRACEWELL & GIULIANI LLP
111 Congress Avenue
Suite 2300
Austin, Texas 78701-4061
(512) 472-7800

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

February 17, 2006

Counsel for Powerex Corp.

QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, that engages in energy trade on behalf of the foreign state, and that performs international treaty and trade agreement obligations for the benefit of the foreign state, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.
2. Whether an entity is an "agency or instrumentality of a foreign state" under the FSIA, 28 U.S.C. § 1603(b)(2), when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp., a Canadian corporation, dba Powerex Energy Corp. was the defendant in the district court and is the appellant in the court of appeals proceedings.

Respondent California Department of Water Resources was the plaintiff in the district court and is the appellee in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.



TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW.....	3
JURISDICTION.....	3
TREATY & STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION.....	10
I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN FSIA "ORGAN" OF A FOREIGN STATE.....	13
A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Imposed.....	13
B. The Ninth Circuit's Decisions Conflict With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State.....	17

C. Uniform Application Of The FSIA's Protections Is Critically Important To Foreign Governments Conducting Business In The U.S.....	23
D. The Ninth Circuit's Decisions Create Significant Tensions With The U.S.'s Duties Under The North American Free Trade Agreement.....	25
II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH <i>DOLE FOOD</i>	26
CONCLUSION.....	29
APPENDIX	

TABLE OF AUTHORITIES

	Page
CASES	
<u>United States</u>	
<i>Bolden v. Southeastern Pennsylvania Transp. Auth.</i> , 953 F.2d 807 (3d Cir. 1991)	17
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993)	21
<i>California v. NRG Energy Inc.</i> , 391 F.3d 1011 (9th Cir. 2004), <i>petition for cert. pending</i> , No. 05-85 (docketed July 18, 2005)	1, 2, 5, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 23, 25, 28
<i>Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect</i> , 89 F.3d 650 (9th Cir. 1996)	16, 19, 21, 26
<i>Davis v. McCourt</i> , 226 F.3d 506 (6th Cir. 2000)	18, 24
<i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003)	2, 12, 14, 23, 26, 27, 28
<i>EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.</i> , 322 F.3d 635 (9th Cir.), <i>cert. denied</i> , 540 U.S. 1003 (2003)	15, 16, 23
<i>EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.</i> , 257 F.3d 992 (9th Cir. 2001).....	15

Filler v. Hanvit Bank:

247 F. Supp. 2d 425 (S.D.N.Y. 2003), <i>vacated in part</i> , Nos. 01 Civ. 9510 <i>et al.</i> , 2003 WL 21729978 (S.D.N.Y. July 25, 2003), <i>aff'd</i> , 378 F.3d 213 (2d Cir.), <i>cert. denied</i> , 125 S. Ct. 677 (2004)	18-19
378 F.3d 213 (2d Cir.), <i>cert. denied</i> , 125 S. Ct. 677 (2004)	18
<i>First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba</i> , 462 U.S. 611 (1983)	1
<i>Focus Media Inc., In re</i> , 387 F.3d 1077 (9th Cir. 2004), <i>cert. denied</i> , 125 S. Ct. 1674 (2005)	27
<i>Gates v. Victor Fine Foods</i> , 54 F.3d 1457 (9th Cir. 1995)	13, 14, 15, 19
<i>Gorenc v. Salt River Project Agric. Improvement & Power Dist.</i> , 869 F.2d 503 (9th Cir. 1989)	17
<i>Kelly v. Syria Shell Petroleum Dev. B.V.</i> , 213 F.3d 841 (5th Cir. 2000)	18, 19, 20, 22
<i>Mutual Life Ins. Co. v. Mooreman</i> , 366 F.2d 686 (9th Cir. 1966)	27
<i>Patrickson v. Dole Food Co.</i> , 251 F.3d 795 (9th Cir. 2001), <i>aff'd in part</i> , 538 U.S. 468 (2003)	14, 19, 20
<i>RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima</i> , 338 F. Supp. 2d 1208 (D. Colo. 2004)	18
<i>Shirobokova v. CSA Czech Airlines, Inc.</i> , 335 F. Supp. 2d 989 (D. Minn. 2004)	18
<i>Supra Med. Corp. v. McGonigle</i> , 955 F. Supp. 374 (E.D. Pa. 1997)	19

<i>Terrorist Attacks on September 11, 2001, In re,</i> 349 F. Supp. 2d 765 (S.D.N.Y. 2005).....	18
<i>United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.</i> , No. 97 Civ. 6124, 1999 WL 307666 (S.D.N.Y. May 17, 1999), <i>aff'd</i> , 199 F.3d 94 (2d Cir. 1999)	19
<i>USX Corp. v. Adriatic Ins. Co.</i> , 345 F.3d 190 (3d Cir. 2003), <i>cert. denied</i> , 541 U.S. 903 (2004)	11, 16, 18, 19, 20, 21, 23
<i>Verlinden B.V. v. Central Bank of Nigeria</i> , 461 U.S. 480 (1983)	3

British Columbia

<i>Westbank First Nation v. British Columbia Hydro & Power Auth.</i> , [1997] 154 D.L.R. (4th) 93, <i>aff'd</i> , [1999] 4 C.N.L.R. 277.....	27
---	----

TREATIES

<i>North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289</i>	25, 26
--	--------

<i>Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309</i>	7
---	---

Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555	4
---	---

STATUTES

United States

Federal Power Act, 16 U.S.C. § 791a <i>et seq.</i>	9
--	---

Foreign Sovereign Immunities Act of 1976:

28 U.S.C. § 1391(f)	3
28 U.S.C. § 1441(d).....	3, 9
28 U.S.C. § 1602 <i>et seq.</i>	1
28 U.S.C. § 1603(a).....	4, 9, 13, 15
28 U.S.C. § 1603(b).....	4, 13, 14, 15
28 U.S.C. § 1603(b)(1)	15
28 U.S.C. § 1603(b)(1)-(3).....	13, 15
28 U.S.C. § 1603(b)(2)	1, 11, 12, 13, 14, 23, 24, 26, 27, 28
28 U.S.C. § 1603(d).....	14
28 U.S.C. § 1604	3
28 U.S.C. § 1605	3
28 U.S.C. § 1605(a)(2)	16
28 U.S.C. § 1608	3

28 U.S.C. § 1609	3
28 U.S.C. § 1610	3
28 U.S.C. § 1611	3
28 U.S.C. § 1254(1).....	3, 10
28 U.S.C. § 1331	9, 10
28 U.S.C. § 1441(a).....	9
28 U.S.C. § 2101(e).....	3, 10
 <u>British Columbia</u>	
British Columbia Hydro and Power Authority Act, [R.S.B.C. 1996], ch. 212	4
§ 3(1)	5, 27
British Columbia Power for Jobs Development Act, [S.B.C. 1997], ch. 51	7
§ 2	7
§ 3	7
Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), <i>reprinted in</i> [R.S.C. 1985], App. II, No. 5, § 125.....	8
Financial Administration Act, [R.S.B.C. 1996], ch. 138, at http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm	8
§ 1(b)	8
§ 4.1	8